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4 RAHUL MEWAWALLA,
5 Plaintiff,
6 v.
7 STANLEY C. MIDDLEMAN, et al.,
8 Defendants.

9 Case No. [21-cv-09700-EMC](#)
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13 **AMENDED PRETRIAL CONFERENCE
14 ORDER**

15 (**Slight modifications of Docket No. 264
16 on page 18.)
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19 **I. TRIAL DATES AND LENGTH OF TRIAL**

20 Jury Selection is set for 2/5/2025, at 8:30 AM in San Francisco, Courtroom 05, 17th Floor
21 before Judge Edward M Chen. Screening on the basis of questionnaires of prospective jurors who
22 obviously cannot serve shall be held via virtual hearing on 1/24/2025 at 1:30 p.m.

23 Trial will last five court days. The Court will meet with Parties each morning at 8:00AM to
24 discuss any matters outside the presence of the jury. Trial Dates and Hours are: 2/5/2025 (8:30
25 AM-4:00 PM), 2/6/2025 (8:30AM-12:30 PM), 2/7/2025 (8:30 AM-4:00 PM), 2/10/2025 (8:30
26 AM-4:00 PM), 2/11/2025 (8:30 AM-4:00 PM) in San Francisco, Courtroom 05, 17th Floor before
27 Judge Edward M Chen. The Court expects the **jury to receive the case by noon of 2/11/2025**.
28 Parties are each allotted **10 hours** of trial time, inclusive of opening statements and closing
29 arguments.

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31 **II. TRIAL PROCEDURES**

32 A. **Evidence and Objections**

33 The Court imposes the following trial procedures regarding evidence and objections. A
34 party must give the opposing party at least forty-eight (48) hours' (excluding weekends and
35

1 holidays) notice of witnesses it intends to call, exhibits it intends to use, and/or demonstratives it
2 intends to use. Saturdays and Sundays do not count. Thus, *e.g.*, for a Monday trial day that starts
3 at 8:00 a.m., a party must give the opposing party notice by 8:00 a.m. on Thursday.

4 If the opposing party has an objection, then it must notify the party by 4:00 p.m. the same
5 day of notice.

6 The parties shall meet and confer immediately that day to see if they can resolve objections
7 to exhibits and demonstratives. If they cannot, then they shall file with the Court a joint statement
8 twenty-four (24) hours (excluding weekends and holidays) in advance of the relevant trial day
9 identifying their respective positions on unresolved issues. In short, the Court requires a full day
10 to resolve any objections. Parties are to follow the instructions/format below for any remaining
11 objections to exhibits, filing a joint statement on the Docket, **as well as submitting Word**
12 **documents of Proposed Orders to both the CAND EMCpo emcpo@cand.uscourts.gov as**
13 **well as the EMCCRD@cand.uscourts.gov email addresses.**

14 The Court emphasizes that a party that makes unreasonable objections may be subject to
15 sanction, including deductions from trial time.

17 Defendant's Exhibits:

Exhibit No.	Sponsoring Witness	Description	Plaintiff's Remaining Objections	Defendants' Response	Court's Ruling
TX-					
TX-					

1 Plaintiff's Exhibits:

Exhibit No.	Sponsoring Witness	Description	Defendants' Remaining Objections	Plaintiff's Response	Court's Ruling
TX-					
TX-					

8 **B. Witnesses**

9 The Parties agreed at the pretrial conference to call each witness only once. Thus, for
 10 witnesses Defendants plans to affirmatively call in their defense, Defendants' cross-examination
 11 during the Plaintiff's case-in-chief will not be limited to the scope of Plaintiff's direct. The Court
 12 will not allow deposition testimony for witnesses who are being called live, except for
 13 impeachment or refreshing recollection.

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15 **III. PLAINTIFF'S MILS**16
17 **A. P's MIL #1: To Exclude the Testimony of Defendants' Expert Richard Harroch**
18 **(Docket No. 217)**

19 Defendants' designated Richard Harroch ("Harroch"), a venture capital investor, as their
 20 rebuttal expert. Harroch will testify about the custom and practice of integration clauses in
 21 corporate agreements; that the process used to terminate Plaintiff for Cause was within the custom
 22 and practice of privately held companies; that the misconduct Plaintiff alleges, including the
 23 "Secret Valuation Scheme," was within the custom and practice of similar companies; and that the
 24 service amounts Plaintiff claims are not within the custom and practice of startup companies.

25 Plaintiff moved to exclude Harroch's testimony because they believe Harroch's expertise
 26 is irrelevant to the issue of industry "custom and practice." Plaintiff also contends that specific
 27 opinions of Harroch's testimony should be excluded because they believe some of his opinions

1 are: (1) outside the scope of rebuttal; (2) improperly state the ultimate conclusions of law; (3)
2 improperly state ultimate determinations of fact; and (4) irrelevant and unduly prejudicial.

3 **1. Whether Harroch's Testimony Should Be Excluded Altogether Because FMC**
4 **is not a Start Up**

5 Plaintiff argues that Harroch's testimony is irrelevant because while he may be qualified to
6 opine on the customs and practices of the startup industry, FMC is not a startup. Plaintiff notes
7 that Harroch repeatedly refers to "Xpanse" – a company Defendants created and hired Plaintiff to
8 lead – as a startup technology company. However, Plaintiff refutes this because Xpanse is a
9 "wholly owned subsidiary" of FMC, which is a multibillion-dollar company. Additionally,
10 Plaintiff was employed by FMC and not Xpanse.¹ But, Plaintiff asserts he had an employment
11 contract and opportunity with Xpanse, and it is debatable whether Xpanse should be considered a
12 startup since despite its relationship with FMC, it was a new company. Harroch thus had a basis
13 for treating Xpanse as a startup.

14 This motion to exclude Harroch's testimony on this ground is **DENIED**.

15 **2. Whether Harroch's testimony is a timely rebuttal**

16 In the case at bar, the normal allocation between and timing of opening expert reports and
17 rebuttal reports set for the in Rule 26(a)(2)(D) does not apply. The Court signed a stipulated order
18 wherein the "deadline to exchange expert opening reports for subject matters on which a party
19 bears the burden of proof" followed by the "deadline to exchange expert rebuttal reports". *See*
20 Docket No. 103. Hence, rebuttal includes any matters on which the propounding party did not
21 have the burden of proof. *See Hynix Semiconductor v. Rambus*, 2008 WL 350647, at *5 (N.D.
22 Cal. 2008). Harroch's report is rebuttal as contemplated in the stipulated order. It was **not**
23 untimely disclosed. And its scope properly responded to Plaintiff's evidence of matters on which
24 the Plaintiff had the burden of proof (liability and damages). Plaintiff's reliance on *Clear-View*
25 *Techs., Inc. v. Rasnick*, 2015 WL 3509384 (N.D. Cal. 2015) is thus off point. *See Blue Bottle*

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27

¹ In Harroch's Expert Report, Harroch states "I understand that [Plaintiff] never signed an
28 employment agreement with Xpanse but that he nevertheless contends that he was an employee of
that company pursuant to . . . his Freedom Employment Agreement."

1 *Coffee, Llc. V. Chuan Liao*, 2023 U.S. Dist. LEXIS 237823 (observing that *Clear-View* is not
2 binding on N.D. California Court while stating “the report at issue there was clearly not rebuttal; it
3 was not on the same subject as the report it was supposedly rebutting, and it should have been part
4 of defendant’s case in chief.”)

5 This motion to exclude Harroch’s testimony on this ground is **DENIED**.

6 **3. Whether Harrcoh’s testimony improperly states the ultimate conclusions of**
7 **law**

8 Plaintiff contends that Harroch stated a legal conclusion which is impermissible according
9 to Fed. R. Evid. 702. Experts can embrace the ultimate issue without necessarily usurping the
10 court’s role related to matters of the law. *See* Fed. R. Evid. 704(a). However, an expert witness
11 cannot give an opinion as to her legal conclusion, *i.e.*, an opinion on an ultimate issue of law.
12 *Mukhtar v. Cal. State Univ.*, 299 F.3d 1053 (9th Cir. 2002). To the extent the expert makes
13 reasonable assumptions in applying the expert’s methodology, that is proper even if the
14 assumption makes certain legal assumptions, such as the meaning of a contract. So long as any
15 legal interpretation is clearly made as an assumption, and Harroch does not opine directly on a
16 matter of law, it is not excludable.

17 This motion to exclude Harroch’s testimony on this ground is **DENIED** so long as he does
18 not purport to provide an opinion on matters of law and confines his opinion as being based on
19 certain assumptions about legal matters.

20 **4. Whether Harroch’s testimony improperly state ultimate determinations of**
21 **fact**

22 When an expert tells the jury what result to reach, this does not aid the jury in making a
23 decision but attempts to substitute the expert’s judgment for the jury’s. *United States v. Duncan*,
24 42 F.3d 97, 101 (2nd Cir. 1994) (holding that the testimony of an expert is admissible when it was
25 based on personal knowledge and did not use legally specialized terms or judicially defined terms
26 related to the case.) However, an expert can provide an opinion about whether a party’s conduct
27 acted in conformance with applicable standards or “outside of the course of professional practice,”
28 *Navarro v. Hamilton*, 2019 WL 351873 at *8-9 (C.D. Cal. 2019), if those standards are relevant.

1 This is what Harroch does.

2 This motion to exclude Harroch's testimony on this ground is **DENIED**.

3 **5. Whether Harroch's testimony is irrelevant and unduly prejudicial**

4 Harroch's testimony is relevant and the probative value of his testimony is substantially
5 outweighed by any FRE 403 concern.

6 Therefore, this motion on this ground should be **DENIED**.

7

8 **B. P's MIL #2: To Limit the Testimony of Defendants' Expert Wayne Guay (Docket No.**
218)

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10 Pursuant to the July 21, 2023 scheduling deadline to exchange expert rebuttal reports,
11 Defendants declared Wayne Guay ("Guay") as their expert on damages suffered by Plaintiff. On
12 September 20, 2023, the Court granted summary judgment to Defendants on their argument that
13 Plaintiff was not entitled to equity in Xpanse, rendering moot Guay's rebuttal opinions regarding
14 such. On Defendants' trial witness list, Defendants list Guay as someone who will respond to
15 testimony from Plaintiff's damages expert, Dominic Persechini, and will opine about the damages
16 on Freedom's counterclaim.

17 Plaintiff seeks to exclude certain testimony of Defendants' damage expert Wayne Guay on
18 the basis that (1) his testimony regarding Plaintiff's equity damages are irrelevant given this
19 Court's summary judgment motion; (2) certain opinions improperly state ultimate conclusions of
20 law; and (3) certain opinions improperly state ultimate determinations that should be left for the
21 factfinder. Wayne Guay is a professor of accounting at the Wharton School of the University of
22 Pennsylvania and has been an expert on executive compensation and incentives, corporate
23 governance, employee stock option valuation, insider trading, firm valuation and financial
24 statement analysis. He is not a lawyer.

25 Defendants agree with Plaintiff on mootness of the equity damages item (1). However,
26 Defendants argue that Guay's expert opinions concerning the remaining contract and fraud claims
27 are admissible and relevant. Specifically, Defendants contend their expert should be able to
28 respond to the underlying assumptions regarding severance-payment calculations made by expert

1 Dominic Persechini and by challenging expert Persechini assessment of Plaintiff's financial losses
2 stemming from the alleged fraud which allegedly cost him a job with E&V.

3 **1. Whether Many of Guay's Opinions are Relevant Following the Court's**
4 **Summary Judgment Order**

5 Because the Court previously ruled that Plaintiff was not entitled to equity in Xpanse and
6 not permitted to bring claims under California Labor Code, See ECF 160 at 20-28, Guay need not
7 and may not testify on the equity issue.

8 Motion to exclude this part of Guay's testimony is **GRANTED**.

9 **2. Whether Some of Guay's Opinions Should be Excluded because they are Legal**
10 **Opinions**

11 Defendants argue challenging another expert's assumptions is a permissible topic of
12 rebuttal testimony. *Pinterest, Inc. v. Pintrips, Inc.*, 2015 WL 2268498, at *1 (N.D. Cal. 2015).
13 Defendants claim the gist of Guay's opinion is that Persechini's fraud damages calculation is
14 based on Plaintiff's alleged employment opportunity at E&V, which is a speculative assumption.
15 Specifically, Defendants argue that Guay is entitled to tell the jury that Persechini deviated from
16 accepted economic principles by assuming that Plaintiff would have been employed at E&V if he
17 had not joined FMC. Defendants argue there are many other broad and unsupported assumptions
18 that Pereschini opines to that Guay should have the ability to rebut. Defendants contend that these
19 assumptions balloon the supposed damages for the alleged loss of the E&V opportunity.

20 Plaintiff takes issue with the below opinions provided by Guay Regarding the E&V
21 opportunity:

22 As I explain below, I find Mr. Persechini's damages arising from the
23 purportedly lost E&V opportunity speculative. They are based on
24 speculative assumptions and inconsistent with the specific terms of
25 the Draft E&V Service Agreement that he relied on, which I
26 understand was never agreed upon by the parties.

27 Rocos Decl., Ex. A, ¶ 14.

28 Mr. Persechini Relies on Terms that Were Never Agreed to . . . As
29 an initial matter, contrary to Mr. Mewawalla's claim that the
30 agreement was "pretty much final,"³¹ information in the record
31 indicates that Plaintiff and E&V had not yet reached an agreement
32 regarding the terms.

1 Rocos Decl., Ex. A, ¶ 15-16.

2 This list calls into question Mr. Mewawalla's characterization that
3 an agreement was "pretty much final." Other than Mr. Mewawalla's
4 testimony, there is no evidence a deal would have been struck given
5 the changes Mr. Mewawalla was requesting. Mr. Persechini
6 provides no evidence E&V would accept the changes Mr.
7 Mewawalla requested, and no contemporaneous evidence that Mr.
8 Mewawalla would have accepted the E&V draft agreement had
9 E&V not agreed to his changes.

10 Rocos Decl., Ex. A, ¶ 16 & n.37.

11 Mr. Mewawalla appears to have recognized potential risks
12 associated with being employed under a Service Agreement, as he
13 indicated the following suggestion to the contract from E&V:
14 "Should this be an Employment Agreement and not a Service
15 Agreement (to ensure employee protection/safeguards)?"

16 Rocos Decl., Ex. A, ¶ 17-21.

17 The Persechini Report states that Mr. Mewawalla was to receive a
18 fixed annual salary of €3,000,000 from E&V as per the Draft E&V
19 Service Agreement.⁵⁰ The Draft E&V Service Agreement identifies
20 this sum as being "fixed" and contains no provision that the
company will consider annual escalation.

21 Rocos Decl., Ex. A, ¶ 22.

22 As noted above, Mr. Persechini provides no basis for the assumption
23 of receiving the full bonus except his conversation with Mr.
24 Mewawalla. In fact, as described above, rather than "target," the
25 draft agreement uses the term "up to" which suggests E&V viewed
26 the €2,000,000 bonus as a maximum and not a number that could be
27 reached with certainty. This is another example where Mr.
28 Persechini has simply relied upon Mr. Mewawalla's expectations
rather than performing any independent analysis. Absent any
additional support, the Persechini Report's assumption regarding
Plaintiff's annual bonuses at E&V is speculative.

29 Rocos Decl., Ex. A, ¶ 25.

30 The Court holds that neither expert, Guay or Persechini, can give a legal opinion about the
31 strength of the evidence on whether the E&V Agreement could have led to actual employment,
32 and how well Plaintiff would have performed at E&V. Each expert can simply state their
33 assumptions in rendering their financial calculations and leave it to the evidence developed at trial
34 and attorney argument to determine whether the asserted fraud-based damages are based on facts
35 or speculation. Accordingly, many of Guay's opinions as to the strength of the evidence

1 underlying the assumptions is not a matter within his expertise and are thus stricken. If there are
2 terms in the draft Agreement which are ambiguous, he can explain his opinions are based on
3 certain assumptions about the meaning of those terms, so long as he does not purport to give a
4 legal opinion as to their meaning.

5 Guay also challenges Persechini's calculation of breach of contract damages stemming
6 from Plaintiff's termination from FMC/Xpanse. In response to Plaintiff's *Daubert* challenge to
7 Guy, Defendants contend that expert testimony is admissible to help the trier of fact on meaning of
8 terms with specialized meaning, *Corbus, LLC v. 8th Bridge Capital, Inc.*, 2021 WL 4439220, at
9 *4 (C.D. Cal. 202), and the severance provisions in Plaintiff's Employment Agreement includes
10 specialized language. Guay's rebuttal testimony highlights section 8(d)(ii) of the severance
11 section of the employment agreement with FMC to show that Persechini engaged in double
12 counting in erroneously inflating Plaintiff's damages claim. He states:

13 I find Mr. Persechini's assumptions speculative, conceptually
14 flawed, and inconsistent with the specific terms of the FMC
15 Employment Agreement that he relied on. Below I explain the
shortcomings of the Persechini Report's terms and unsupported
assumptions.

16 Rocos Decl., Ex. A, ¶ 32.

17 In short, Mr. Persechini's damages calculation assumes with
certainty that Mr. Mewawalla would be employed for six years
18 when the contract provides no such guarantee and, in fact,
contemplated the ability of Freedom to dismiss Mr. Mewawalla.
19 Therefore, Mr. Persechini's assumption is highly speculative and
unreliable. Indeed, I understand from counsel given Mr.
20 Mewawalla's performance, Xpanse would have terminated Mr.
Mewawalla regardless of whether or not the firing was classified as
21 being with cause.

22 Rocos Decl., Ex. A, ¶ 34-35.

23 The employee contract signed by Mr. Mewawalla does not include
any guarantee of salary increases, but rather states that it "may be
24 increased periodically (but shall not be subject to decrease below
\$1,500,000), as determined by the CEO of [Freedom Mortgage] at
25 his sole discretion."

26 Rocos Decl., Ex. A, ¶ 37.

27 The signed FMC Employment Agreement makes clear that, after the
first year, the performance bonus was subject to an annual
28 performance evaluation[.]

1 Rocos Decl., Ex. A, ¶ 40.

2 The Persechini Report calculates the damages from alleged unpaid
3 severance based on the assumption that the court finds the
4 Defendants liable for Mr. Mewawalla's unpaid severance. I
5 understand that, according to the FMC Employment Agreement, Mr.
6 Mewawalla would not be eligible for such payments if he were
7 terminated for cause. However, if he were terminated without cause,
8 according to the contract, he would be eligible for severance,
including base salary, performance discretionary bonuses, and
twelve months of group medical benefits. Mr. Persechini was asked
to assume the discretionary bonus would be calculated using 100
percent and 150 percent of base salary.

9 Rocos Decl., Ex. A, ¶ 60.

10 Mr. Persechini reports that Mr. Mewawalla's severance pay should
11 be \$3 million or \$3.75 million under section 8(d)(i) (one-year base
12 plus one-year bonus at either 100 percent target or 150 percent
13 target), \$1.5 million or \$2.25 million under 8(d)(ii) (full-year
14 preceding year bonus at either 100 percent target or 150 percent),
plus \$1.375 million or \$2.0625 million (his prorated share of his
prior-year bonus at 100 percent or 150 percent). Mr. Persechini has
provided no basis for including damages associated with Section
15 8(d)(ii) of the Employment Agreement given Plaintiff was
16 terminated before the end of his first Performance Year. Moreover,
17 if Mr. Mewawalla were entitled to a full year of Discretionary
18 Bonus, it would render 8(d)(iv) meaningless. I have been asked to
recalculate Mr. Persechini's damages assuming his severance
payment equals one year salary plus the prorated portion of
Discretionary Bonus (at 100 percent of target) in the year in which
he was terminated. This equals \$2,918,713 before prejudgment
interest and \$3,680,252 after considering prejudgment interest.

19 Rocos Decl., Ex. A, ¶ 62.

20 The interpretation of the Severance Provision, including that of Section 8(d)(ii) is a matter
21 upon which the Court has ruled, as noted below and at the pretrial conference. This obviates the
22 need for Guay's testimony on the problem with Persechini's assumption about the meaning of the
23 Severance Provision. Because Persechini's testimony will be limited by this Court's ruling, this
24 obviates this aspect of Guay's testimony.

25
26 This motion to exclude Harroch's testimony on the ground is **DENIED** as moot.

1 3. Whether Guay's Opinions should be excluded because they improperly state
2 ultimate decisions that should be left to the factfinder.

3 Guay's proposed testimony contains additional comments on the strength of the factual
4 evidence regarding Mr. Mewawalla's performance. For instance, he states:

5 Moreover, the Company had concerns about Mr. Mewawalla's
6 performance, and he was ultimately terminated in January 2021 for
7 poor performance, a fact that suggests Mr. Mewawalla may well
8 have received less than his expected salary increases had he
9 remained employed.

10 Rocos Decl., Ex. A, ¶ 38.

11 Given the growing dissatisfaction with Mr. Mewawalla's
12 performance within Xpanse and Freedom in November 2020 and the
13 performance of the company, it is not credible that the Board or
14 CEO would have approved substantial increase in his target bonus
15 compensation.

16 Rocos Decl., Ex. A, ¶ 41.

17 Moreover, as noted above, the Company had concerns about Mr.
18 Mewawalla's performance, and he was ultimately terminated in
19 January 2021 for poor performance, a fact that suggests Mr.
20 Mewawalla may well have received less than the target bonus had
21 he remained employed.

22 Rocos Decl., Ex. A, ¶ 42.

23 There is no suggestion in the presentation that the potential for a 150
24 percent bonus was available to Mr. Mewawalla nor has Mr.
25 Persechini cited any evidence in the record that the Freedom
26 Mortgage CEO or Board of the company had approved it, as
27 required by his contract. Given the growing dissatisfaction with Mr.
28 Mewawalla's performance within Xpanse and Freedom in
November 2020 and the performance of the company, it is not
credible that the Board or CEO would have approved a substantial
increase in his target bonus compensation.

23 Rocos Decl., Ex. A, ¶ 41.

24 This kind of commentary on the strength of the evidence to show the likely short length of
25 Plaintiff's employment with FMC/Xpanse given his performance issues are matters squarely
26 within the province of the jury and not something within his expertise. Although Guay may be
27 qualified to talk about normal industry practices which the jury may consider in determining, *e.g.*,
28 how long Plaintiff would have been employed by FMC/Xpanse, he may not opine on the facts and

1 ultimate question of whether Plaintiff was terminated for Cause or would likely have been
2 terminated sooner rather than later.

3 This motion to exclude Harroch's testimony on this ground is **GRANTED**.

4

5 **C. P's MIL #3: To Exclude the Testimony of Defendants' Expert Matthew Finkin**
6 **(Docket No. 219)**

7 Defendants have agreed that Finkin will not testify, thus, the Court does not need to rule on
8 this motion.

9

10 **D. P's MIL #4: To Exclude the Testimony of Defendants' Witness Robert King (Docket**
11 **No. 220)**

12 Plaintiff has moved to exclude testimony of Defendant's witness Robert King. Following
13 the Court's Order at Docket No. 241 allowing the deposition of King prior to trial, Parties
14 confirmed at the pretrial conference that the deposition of Mr. King will take place on January 15,
15 2025. Accordingly, Plaintiff's motion is **DENIED**.

16

17 **E. P's MIL #5: To Exclude the Testimony of Defendants' Witnesses Gina Morselli and**
18 **Kiran Sahota (Docket No. 221)**

19 Plaintiff has moved to exclude the testimony of two of Defendant's fact witnesses—Gina
20 Morselli and Kiran Sahota on the grounds that they were not included in Defendant's 26(e)
21 disclosures. Plaintiff's motion is **DENIED**.

22 Defendants' trial witness list states that Ms. Sahota will "testify about Xpanse's business,"
23 and Ms. Morselli "will testify about the representations Mr. Mewawalla made about his
24 credentials and compensation." Plaintiff, himself, disclosed Kiran Sahota, and Defendants then
25 incorporated the fact witness on to their list. *Hauschild v. City of Richmond & Christopher*
26 *Magnus*, 2015 WL 7351384, at *3 (N.D. Cal. Nov. 20, 2015) ("[P]laintiff included Dickerson as a
27

28

1 potential witness in his own Rule 26 disclosures. Thus, any assertion that plaintiff has been
2 harmed by defendants' failure to include Dickerson in their own Rule 26 disclosures is baseless.")

3 Defendants state Gina Morselli is merely a potential impeachment witness. Rule 26(a) does
4 not require the disclosure of witnesses who would be called "solely for impeachment," so there is
5 not any failure-to-disclose for the Court to remedy. Ms. Morselli was a talent recruitment
6 executive at Freedom in July 2019, she interviewed Mr. Mewawalla after he applied for a job,
7 took notes of what he told her, and then sent them to Stanley Middleman. Defendant argues if Mr.
8 Mewawalla confirms the accuracy of his statements as she recorded them, there will be no need
9 for Defendants to call Ms. Morselli. If he denies telling her those things, Defendants will call her
10 to impeach him.

11 Accordingly, there has been no disclosure violation, so exclusion is not appropriate.
12 Plaintiff's motion is **DENIED**.

13

14 **IV. DEFENDANTS' MILS**

15

16 **A. D's MIL #1: To Exclude the Testimony of Rahul Mewawalla Regarding a German**
Employment Opportunity (Docket No. 223)

17

18 Defendant has moved to exclude all evidence Mr. Mewawalla will likely rely on for his
19 claims in Counts 1 and 2, that but for misstatements and omissions from Freedom inducing him to
20 work there, he would have accepted a job offer from a German firm, Engel & Volkers ("E&V"),
21 that allegedly guaranteed him \$38 million. Compl. ¶¶ 142-43, 149-51. Plaintiff alleges that his
22 decision to proceed with FMC instead of with E&V—and thus not to actually enter into an
23 agreement with EV—was the product of Defendants' false promises and fraudulent concealment;
24 that his ultimate gains from FMC were substantially less than the benefits he would have received
25 if he had worked at E&V instead; and that he is entitled to damages for those lost benefits. *See id.*
26 ¶¶ 143, 151, 161, 170, 267. Defendants dispute, *inter alia*, whether this opportunity with E&V
27 would have materialized.

1 As proof of these alleged fraud damages, Mr. Mewawalla relies on (i) a draft agreement he
2 says E&V prepared for him to sign (that Plaintiff initially states was the final version, but later
3 discovery showed Plaintiff had sent many emails to his lawyer seeking to change terms); (ii)
4 statements he attributes to E&V's CEO and others that the draft was signature-ready; and (iii)
5 statements he attributes to a German lawyer that German law guaranteed him three years of
6 compensation regardless of his performance. Defendant claims all of these statements and
7 documents are hearsay, and that Plaintiff has failed to identify any German lawyer or E&V
8 witness who can corroborate Mr. Mewawalla's claims. *See* Fed. R. Evid. 801, 802.

9 Plaintiff counters that the items are not hearsay under the "verbal acts" doctrine because
10 the E&V agreement is merely being offered to establish that Plaintiff had another job offer, not for
11 the truth of the matter asserted. *N.L.R.B. v. H. Koch & Sons*, 578 F.2d 1287, 1291 (9th Cir. 1978).
12 Plaintiff also argues, if the agreement is found to be hearsay, the E&V statement should be subject
13 to a hearsay exception of a business record under Fed. R. Evid. 803(6), or the residual exception
14 under Fed. R. Evid. 807. FRE 803(6) business exception states:

15 "A record of an act, event, condition, opinion, or diagnosis if:
16 (A) the record was made at or near the time by — or from
information transmitted by — someone with knowledge;
17 (B) the record was kept in the course of a regularly conducted
activity of a business, organization, occupation, or calling, whether
or not for profit;
18 (C) making the record was a regular practice of that activity;
19 (D) all these conditions are shown by the testimony of the custodian
or another qualified witness, or by a certification that complies with
Rule 902(11) or (12) or with a statute permitting certification; and
20 (E) the opponent does not show that the source of information or the
method or circumstances of preparation indicate a lack of
trustworthiness."

22 FRE 807 residual exception states:

24 "(a) Under the following conditions, a hearsay statement is not
25 excluded by the rule against hearsay even if the statement is not
admissible under a hearsay exception in Rule 803 or 804:
26 (1) the statement is supported by sufficient guarantees of
trustworthiness—after considering the totality of circumstances
under which it was made and evidence, if any, corroborating the
statement; and
27 (2) it is more probative on the point for which it is offered than any
other evidence that the proponent can obtain through reasonable

1 efforts.

2 (b) Notice. The statement is admissible only if the proponent gives
3 an adverse party reasonable notice of the intent to offer the
4 statement—including its substance and the declarant's name— so
that the party has a fair opportunity to meet it. The notice must be
provided in writing before the trial or hearing—or in any form
during the trial or hearing if the court, for good cause, excuses a lack
of earlier notice.”

5 Plaintiff claims that, notwithstanding efforts to secure oral testimony in Germany
6 concerning these documents directly from EV using the Hague Convention, the parties were
7 ultimately unable to do so because of procedural barriers. Defendants agreed to abandon their
8 efforts to secure that testimony.

9 Thus, the Court must determine if the agreement and third-party statements are “verbal
10 acts” or subject to a hearsay exception.

11 **(i) a draft agreement Plaintiff says E&V prepared for him to sign;**

12 Defendants agree that “[a]bundant admissible evidence in the form of [Plaintiff’s] own
13 emails and subsequent drafts” exists. Motion at 5. There is therefore no dispute that subsequent
14 correspondence arising from the draft agreement is admissible. Under the rule of completeness,
15 the initial draft of the E&V Agreement is admissible. FRE 106. It is needed to explain the
16 iterative correspondence which ensued.

17 The E&V Agreement is also admissible under the “verbal act” doctrine. “If the
18 significance of an offered statement lies solely in the fact that it was made, no issue is raised as to
19 the truth of anything asserted, and the statement is not hearsay.” Fed. R. Evid. 801 (Advisory
20 Cmte. Notes to Subdivision (c)). “The effect is to exclude from hearsay the entire category of
21 ‘verbal acts’ and ‘verbal parts of an act,’ in which the statement itself affects the legal rights of the
22 parties or is a circumstance bearing on conduct affecting their rights.” *Id.*

23 The case law is clear, and the parties do not dispute, that a *completed* contract is subjected
24 to the “verbal act” doctrine. *See Mueller v. Abdnor*, 972 F.2d 931, 937 (8th Cir. 1992) (“A contract
25 is a verbal act. It has legal reality independent of the truth of any statement contained in it.”).
26 Additionally, case law and respected commentators, have concluded that “legally significant steps
27 in the contractual chain, such as offers, acceptances, and rejections” can also be considered
28 “verbal acts,” because “these out-of-court statements can be shown in evidence not as proof of

1 what they assert (“I will (or won’t) buy your house for \$90,000”), but rather for the independent,
2 legally-determined effect such statements generate.” *Wright & Miller*, 30B Fed. Prac. & Proc.
3 Evid. § 6722 (2024 ed.). Verbal acts include “the documents and oral exchanges that surround
4 contract formation.” *Id.*; *see Mueller*, at 937 (“[V]arious communications—*e.g.*, conversations,
5 letters, and telegrams—relevant to the making of the contract are also not hearsay.”) Thus, to the
6 extent Plaintiff is offering the E&V Agreement to show an offer was made that contained specific
7 terms and that the parties were heading towards an agreement,² this is a “verbal act.” *See United*
8 *States v. Arteaga*, 117 F.3d 388, 397 n.16 (9th Cir. 1997) (“[T]he statement of a merchant that he
9 is willing to sell 100 pounds of coffee for \$300 may be legally operative as an offer; in an action
10 on the contract, the ‘truth’ of the statement is not at issue. This type of statement is sometimes
11 called a ‘verbal act.’”).

12 Defendants asserted at the hearing that because the offer was not in a final “accepted” or
13 “acceptable” format, it effectively was not “legally operative” and cannot constitute a “verbal act.”
14 This is because certain terms were missing, including: the start date, Plaintiff’s reimbursement for
15 travel and hotel accommodations, a relocation allowance, and secondary activities that E&V

16
17 ² In Defendants’ further briefing on the “verbal act” doctrine as ordered by the Court, Docket No.
18 260, Defendants argue that the “verbal act” doctrine cannot apply here because Plaintiff’s rely on
19 the *terms* of the agreement, not just the *fact* that an offer was made. But an offer is legally
20 significant not just because it was made, but also because of what it contains. *See Shimer v. Foley,*
21 *Hoag & Eliot LLP*, 795 N.E.2d 599, 602-04 & n.11 (Mass. App. Ct. 2003) (case cited by Plaintiff,
22 Docket No. 260) (noting Massachusetts applies the “same doctrine” as federal law, and that “proof
23 of the [rejected] offer, even as evidence of damages, was not dependent on the truthfulness,
honesty or sincerity” of the offeror, but rather “the significance of the words used by [the
24 company] in making the offer was in the fact that they were communicated to [plaintiff] and that
he would have accepted; their import, that that point, was unrelated to whether [the offeror] truly
meant to pay the amounts it proposed.”). A contract which clearly constitutes a verbal act may
25 establish not only the fact of an agreement but also the terms of that agreement. Inherently there is
26 some assertion of the “truth” of the matter asserted – *i.e.* what the terms of the agreement were.
That fact does not defeat the verbal acts doctrine.

27
28 Defendants offer some non-binding case law support that “offers” that are not accepted fail to
have legal significance for a non-hearsay purpose. *See* Docket No. 260, page 1; *Echo Acceptance*
Corp. v. Household Retail Servs., Inc., 267 F.3d 1068, 1087-88 (10th Cir. 2001) (“Only
‘utterances by the parties … constituting the offer and acceptance which brought the contract into
being’ qualify as verbal acts.”) (citing McCormick on Evidence § 249 (5th ed.1999)) The Court
does not subscribe to that narrow application of the verbal acts doctrine. In any event, to the
extent it could be argued the E&V Agreement is also being offered for the truth of the matter and
not for its legal effect, the evidence is admissible under FRE 807 as noted below.

1 would allow him to continue. Defendants also argue that in discovery, Plaintiff produced emails
 2 showing “much different versions of the draft E&V agreement, along with emails he authored and
 3 sent to both his German lawyer and E&V’s recruiter, requesting significant changes. Motion at 3-
 4.³ Plaintiff’s counsel then sent a revised agreement to E&V, reflecting these requested changes.
 5 *Id.* It appears there was no further follow-up between E&V and Plaintiff.

6 There is little case law detailing the bounds of *when* an offer becomes a verbal act. After
 7 reviewing the Parties’ cited case law, Docket Nos. 259, 260, the Court finds Defendants’
 8 arguments that the draft agreement was not in a sufficiently “acceptable” form so as to fall under
 9 the verbal act rubric unpersuasive.⁴ First, as noted above, there is persuasive support for the
 10

11 ³ Some of the changes Plaintiff asked for via email include:

- 12 • “STI should say’ [sic] target of 2M EUR’ not ‘up to’”
- 13 • “For initial signing bonus, this following line needs to be removed – ‘on the condition
 14 that until then no party has given notice for termination to the other party and this Service
 15 Agreement has not been terminated otherwise”
- 16 • “Please change employment contract duration to 4 years (not 3 years) as agreed”
- 17 • “Has to include executive can serve on up to 3 outside supervisory boards or equivalent
 18 boards of companies or charities and receive compensation from these companies”
- 19 • “Vacation at 20 days seems low”
- 20 • “Equity Agreement needs to be specified in and be part of this agreement”
- 21 • “Has to include Severance/termination i.e. payout to executive of (a) base salary (b) plus
 22 STI at 100% of target (c) in addition to STI at 100% for current year on pro-rate basis and (d)
 23 benefits for standard 18 months-2 years if termination/severance happens; or if the company does
 24 not meet or fulfill its contract obligations to executive, executive is entitled to receive full
 severance compensation”
- 25 • “Need to remove ‘Publications and speeches etc. which may affect the interests of the
 Company, require prior written consent of the Company’ and ‘Any consent granted may be
 26 revoked by the Company at any time’ – why do I need prior written consent?”
- 27 • “Employer to indemnify executive from any liability; also provide executive with
 28 directors & officers insurance”

29 “Please add clause that whether or not the executive accepts the offer, the company will
 30 pay any fees or expenses to executive’s counsel to review and assist with the employment
 31 contract”

32 ⁴ See e.g., *Twin City Fire Ins. Co. v. Country Mut. Ins. Co.*, 23 F.3d 1175, 1182-83 (7th Cir. 1994)
 33 (insurer’s offer to settle was a verbal act and thus admissible non-hearsay even though the offer
 34 was not accepted because the counterparty could accept it “within some reasonable time after” the
 35 offer, and thus become a binding contract); *Cloverland-Green Spring Dairies, Inc. v.*
 36 *Pennsylvania Milk Mktg. Bd.*, 298 F.3d 201, 218 (3d Cir. 2002) (“[A] statement offering to sell a
 37 product at a particular price is a ‘verbal act,’ not hearsay, because the statement itself has legal
 38 effect.”)

1 proposition that not only offers but other “communications” “relevant to the making of a contract”
2 or surrounding the negotiations of the contract can be verbal acts. *See Wright and Miller, supra,*
3 and *Mueller* at 937. It is not only a finalized contract that has or could have legal effect—
4 statements and circumstances leading up to a contract also bear legal significance. *See e.g.*
5 Restatement (Second) of Contracts § 26 Preliminary Negotiations (1981) (“Even though a
6 communication is not an offer, it may contain promises or representations which are incorporated
7 in a subsequent offer and hence become part of the contract made when the offer is accepted.”);
8 **⁵¹ *Witkin, Summary of California Law, Contracts*, § 771 Surrounding Circumstances (11th ed.
9 2024) (“A contract may be explained by reference to the circumstances under which it was made,
10 and the matter to which it relates.”); *Hinesley v. Oakshade Town Center*, 135 Cal.App.4th 289,
11 301 (2005) (statement preceding contract may be admitted to prove fraudulent inducement;
12 *Consortium Info. Servs., Inc. v. Credit Data Servs., Inc.*, 149 F. App’x 575, 576–77 (9th Cir. 2005)
13 (statement used to make estoppel argument).** Moreover, as a factual matter, it is noteworthy that
14 the E&V Agreement was a thoroughly written draft contract containing nearly all material terms.
15 And Plaintiff will testify to the statements the CEO told him in conjunction with sending this offer
16 that it was “ready to go.” Thus, there appears to be evidence that will be presented at trial that the
17 offer could have been accepted or was close to a format that could have been accepted. A jury
18 could so find. *Cf. Huddleston v. United States*, 485 U.S. 681, 690 (1988). This, of course, does
19 not prevent Defendants from offering at trial Plaintiff’s follow-up emails regarding suggested
20 change to terms of the E&V draft agreement, as well as Plaintiff’s later versions of the draft
21 (admissible as party opponent admissions, FRE 801(d)(2)), to cast doubt on how final the offer
22 may have been and to prove that the parties in fact were not close to an agreement; Defendants
23 have plenty of room to prove that Plaintiff’s claim of lost opportunities with E&V was
24 speculative.

25 Plaintiff also argues the E&V Agreement is subject to the business record exception. Opp.
26 at 3-4. The initial draft was produced to Defendants by Korn Ferry, who was hired by E&V for
27

28 ⁵ ** Denotes amended section.

1 recruitment in connection with E&V's discussions with Plaintiff. Korn Ferry has authenticated the
2 documents in their records. Declaration of Oliver Rocos ("Rocos Decl.") ¶ 2, Ex. A (Affidavit of
3 Custodian of Records of Korn Ferry) ¶ 3 ("In 2019-2020, Korn Ferry assisted its client Engel &
4 Volkers AG with the recruitment of a candidate named Rahul Mewawalla."); Rocos Decl. ¶ 3, Ex.
5 B (KF_0103, *et seq.*). For the reasons discussed below, Korn Ferry's possession of the draft
6 agreement is a business record, but the content of the draft presents another layer of potential
7 hearsay not encompassed by the business record exception. Thus, though the content of the draft
8 agreement is not admissible as a business record pursuant to FRE 803(6), the draft being kept and
9 produced by Korn Ferry corroborates the authenticity of the Agreement.

10 And finally, Plaintiff seeks an exception for the E&V Agreement under the "residual
11 exception," FRE 807, arguing that notwithstanding tremendous effort to secure oral testimony
12 concerning these documents directly from E&V using the Hague Convention, the Parties were
13 ultimately unable to do so. This exception admits hearsay statements not otherwise admissible
14 where "(1) the statement is supported by sufficient guarantees of trustworthiness—after
15 considering the totality of circumstances under which it was made and evidence, if any,
16 corroborating the statement; and (2) it is more probative on the point for which it is offered than
17 any other evidence that the proponent can obtain through reasonable efforts." The E&V
18 Agreement is a written contract, authenticated by the recruiting firm Korn Ferry that E&V hired to
19 recruit Plaintiff. There appears to be no reason, and Defendants have not offered any reason, to
20 distrust the E&V Agreement or Korn Ferry. Though it was Defendants who initially sought
21 testimony through the Hague Convention in Germany, the Parties told the Court E&V would not
22 agree to waive any confidentiality, and thus the efforts to secure any testimony about these
23 documents ultimately failed. Given this circumstance, it would not have been "reasonable" for
24 Plaintiff to then attempt to secure testimony on their own. Accordingly, Plaintiff is also able to
25 rely on the residual exception, FRE 807, to offer the E&V Agreement, and accompanying
26 elements of this alleged offer.⁶

27
28 ⁶ In Plaintiff's additional briefing as ordered by the Court, Docket No. 260, Plaintiffs cite, and the Court finds persuasive, *Virola v. XO Communications Inc.*, 2008 WL 1766601, at *16 (E.D.N.Y.

(ii) statements Plaintiff attributes to E&V's CEO and others that the draft, despite terms left blank, was signature-ready; and

Defendants seek to exclude alleged statements by the E&V CEO made to Plaintiff including that “they were looking for me to come in as the managing director, and bring in both technology mindset, and a Silicon Valley mindset, for them to continue advance and accomplish their plans,” that “they are looking for a managing director, and I would be a very good fit,” the parties’ discussions about “their plans,” “their financials,” and “compensation,” and Plaintiff’s understanding that the draft EV Agreement was “ready to go” based on his conversations with the CEO. Mot. at 1–3 (citing Declaration of Robert J. Nolan (“Nolan Decl.”), Ex. A at 85, 88, 89, 92).

To the extent Plaintiff attempts to get in any “communications” E&V’s CEO made in connection with E&V’s initial offer, those are admissible as verbal acts as discussed above. *See Mueller*, at 937. Moreover, Plaintiff confirmed at the pretrial conference he will not assert at trial that there were additional terms discussed orally which are not referenced in a written document. The Court will hold Plaintiff’s to this representation. This will cabin Plaintiff’s testimony and mitigate the prejudice Defendants contend will obtain if what they consider hearsay is admitted. Additionally, as noted above, Plaintiff may also rely on the residual exception, FRE 807, to offer statements the CEO made in connection with his initial offer to Plaintiff.

Additionally, to the extent E&V's CEO made statements to Korn Ferry as part of their recruitment process, there are two potential layers of hearsay. First, the documents Korn Ferry drafted, and then the statements made by the CEO. These documents are admissible pursuant to the business record exception. Opp. at 3-4.⁷ Korn Ferry was hired by E&V for recruitment in connection with E&V's discussions with Plaintiff. Korn Ferry's custodian of records has certified

Apr. 15, 2008) (finding that where “offers were not accepted,” they “might arguably constitute hearsay,” but “if the plaintiffs cannot produce any alternative nonhearsay evidence,” testimony and the terms of an offer fall into the residual exception of FRE 807 because “[t]he trustworthiness of an offer of employment and a salary quote, at least when given to an experienced professional, is circumstantially guaranteed by the powerful reputational pressures that a competitive labore market exerts on corporations.”)

⁷ Plaintiff has also produced “other documents produced by Korn Ferry in connection with its work on behalf of EV, including a document confirming the EV CEO’s positive reaction following a meeting with Plaintiff, resulting in a “Verbal offer made” on December 12, 2019.” See Rocos Decl. Ex. C (KF_0012).

1 under oath that the records produced “(i) were prepared or maintained by Korn Ferry personnel at
2 or near the times of the acts, conditions, and events described in the records; (ii) were kept in the
3 course of Korn Ferry’s regularly conducted business activity; and (iii) were made by Korn Ferry’s
4 regularly conducted business activity as a regular practice.” Declaration of Oliver Rocos (“Rocos
5 Decl.”) ¶ 2, Ex. A (Affidavit of Custodian of Records of Korn Ferry) ¶ 6. The CEO statements, as
6 noted above, can be offered either through the verbal act doctrine—as “communications”
7 surrounding the offer, *Mueller* at 937, or through the residual exception, FRE 807. Accordingly,
8 the Korn Ferry documents are admissible.

9 **(iii) statements Plaintiff attributes to a German lawyer that German law guaranteed
10 him three years of compensation regardless of his performance.**

11 Statements made by Plaintiff’s German lawyer are hearsay without an exception—they are
12 offered for the truth of the matter asserted by a non-declarant. FRE 801. Plaintiff should have
13 secured testimony by Plaintiff’s German lawyer to corroborate Plaintiff’s version of events. The
14 lawyer’s statement of Plaintiff is not a verbal act since it had no legally operative effect such as an
15 offer. Plaintiff seeks an exception under the “residual exception.” FRE 807. Plaintiff has not
16 offered evidence that supports trustworthiness of Plaintiff’s telling of events; and though
17 Plaintiff’s German lawyer may be outside the subpoena power of this Court, Plaintiff did not
18 attempt to use the Hague Convention and the power of this Court to secure testimony. Plaintiff has
19 also failed to establish with any specificity or proof of “reasonable efforts” Plaintiff underwent to
20 secure testimony.

21 Accordingly, Defendants’ motion is **DENIED** as to the E&V Agreement and surrounding
22 communications from the E&V CEO and is **GRANTED** as to Plaintiff’s German lawyer’s
23 statements.

24 **B. D’s MIL #2: To Exclude Portions of the Expert Opinion of Dominic Persechini
25 (Docket No. 224)**

26 Defendants argue that the Plaintiff’s damages expert, Dominic Persechini offers three
27 inadmissible opinions that should be excluded, including: (1) his opinion on Plaintiff’s fraud
28

1 damages which are highly speculative; (2) his calculation of Plaintiff's severance benefits conflict
2 with the clear terms of the Employment Agreement; and (3) his calculation of the "Xpanse
3 opportunity" which were precluded by my previous summary judgment order.

4 As the Court held above, neither expert, Guay or Persechini, can give a legal opinion about
5 the strength of the evidence—whether the E&V Agreement could have led to actual employment,
6 and how well Plaintiff could have performed at E&V. Each expert can simply state their
7 assumptions in rendering their financial calculations and leave it to the evidence developed at trial
8 and attorney argument to determine whether the asserted fraud-based damages are based on
9 speculation and not recoverable.

10 **1. Whether Persechini's opinion on fraud damages should be excluded on the**
11 **basis of speculation and unreliability**

12 Defendants argue that the E&V Opportunity damages are speculative because they are
13 predicated on the assumption that had Plaintiff been provided with a firm offer from E&V, he
14 could have taken instead of accepting employment at FMC.

15 This Court may exclude expert opinion testimony as speculative that lacks a reliable basis.
16 See Fed. R. Evid. 702; *Elosu v. Middlefork Ranch Inc*, 26 F.4th, 1020 (9th Cir. 2022). 2023
17 amendments to Rule 702 make clear that the four factors of admissibility under FRE 702 must be
18 found by a preponderance of the evidence. See 2023 Advis. Comm. Note. This includes a
19 sufficient factual basis for an opinion—a basis must be something that a reasonable jury could
20 find.

21 In his expert report, Persechini calculates the Plaintiff's total E&V damages to be
22 \$38,489,806—this number is obtained by subtracting Plaintiff's mitigating compensation of
23 \$8,478,215 from Plaintiff's lost non-equity compensation from March 30, 2020 through March 29,
24 2026 which equals \$44,834,986 he would have earned with E&V. These estimations are based on
25 the analysis of the draft service agreement between E&V and Plaintiff. Persechini outlined how
26 the service agreement identified a fixed annual salary, an annual bonus, and two one-time initial
27 bonuses.

28 Defendants rely on *Payan v. L.A. Com. Coll. Distr.*, 2019 WL 8163479, at *3 (S.D. Cal.

1 2019). In *Payan*, the court excluded the testimony of a damage expert who relied on accounts of
2 the plaintiffs which were “wholly unsupported by the record or by anything in [the expert’s]
3 report.” *Id.* Additionally, the expert in that case made several unfounded assumptions, like
4 assuming the plaintiffs would have been immediately hired had they graduated on time without
5 providing any analysis to show the impacts of delayed graduation and hiring timing.

6 Unlike the expert in *Payan*, Persechini’s assumption, while certainly debatable and perhaps
7 questionable, are not so unreasonable such that no reasonable juror could find in Plaintiff’s favor.
8 He relies in large part on the draft employment contract between Plaintiff and E&V which
9 delineate the substantial compensation that Plaintiff would have received thereunder. While
10 subsequent communications cast doubt on whether that agreement would have been consummated
11 had Plaintiff not been induced to go with FMC, that is a matter of debate on which a reasonable
12 juror might decide in Plaintiff’s favor. Thus, Persechini’s assumptions about the E&V agreement
13 were not so unreasonable as to render that assumed fact insufficient under FRE 702.

14 Defendants argue that Persechini failed to account for Plaintiff’s mitigating compensation
15 by not including equity damages from Plaintiff’s current employer in his calculation. But this
16 court already excluded Plaintiff’s claim for equity. Thus, Persechini’s omission of that element of
17 mitigation was not unreasonable. In any event, even if there were an omission of one element, that
18 would not warrant exclusion of the entire testimony. As the Ninth Circuit has observed,
19 “[n]ormally, failure to include variables will affect the analysis’ probativeness, not its
20 admissibility.” *Hemmings v. Tidyman’s Inc.*, 285 F.3d at 1188.

21 Motion to exclude Persechini’s testimony on Plaintiff’s fraud damages on these grounds is
22 **DENIED.**

23 **2. Whether Persechini’s severance calculations should be excluded because they**
24 **conflict with the employment agreement**

25 Defendants argue that Persechini’s breach-of-contract severance calculation per Section
26 8(d)(ii) of the FMC employment agreement should be excluded because it ignores terms of the
27 contract agreement; specifically, they allege that severance clearly applies only when an employee
28 worked an entire year and was entitled to a bonus for that year but had not yet received that bonus

1 when they were terminated. Equally inadmissible, they claim, Mr. Persechini's alterative damage
2 figure assumes performance-based bonuses at 150% of base salary, which is inconsistent with
3 provisions of the Employment Agreement setting bonuses at 100% of base salary.

4 As noted below and at the pretrial conference, this Court has construed the agreement.
5 Section 8(d)(ii) is clear—Plaintiff would only be entitled to the performance bonus described
6 therein only if he worked for a full year and was entitled to that bonus. Plaintiff worked less than
7 a year.

8 Regarding the 150% (versus 100%) bonus rate, Plaintiff claims that subsequent discussions
9 and agreements regarding the discretionary performance bonus plan was determined to be
10 increased up to 150%. Plaintiff offers an Xpanse presentation slide on annual performance and
11 bonuses which demonstrated targets and goals for employees to receive 70%, 100%, 125%, or
12 150% payouts as extrinsic evidence to support this argument. This is a matter the Court reserves
13 for trial.

14 The motion to exclude Persechini's severance calculations because they conflict with the
15 employment agreement is **GRANTED IN PART**.

16 **3. Whether Persechini's calculation of the Xpanse opportunity should be**
17 **excluded**

18 The Court previously dismissed the claim that Plaintiff was wrongfully terminated in
19 violation of public policy in summary judgment order. *See* ECF No. 160, at 28-29. Therefore,
20 Plaintiff cannot claim any amounts on that theory and Persechini cannot provide testimony on the
21 Xpanse opportunity. Following dismissal of Plaintiff's labor code claims, he no longer seeks such
22 damages.

23 **C. D's MIL #3: To Exclude References to Or Evidence of Issues Disposed of At**
24 **Summary Judgment (Docket No. 225)**

25 Defendant moves for a broad order restricting the evidence Plaintiff can offer at trial,
26 barring any evidence that touched on an issue that was disposed of at the summary judgment
27 stage. Order on Summary Judgment at Docket 160. To begin, the Court notes this is an overly
28

1 broad request. Just because evidence may not related to claims and theories that were disposed of
2 at the summary judgment stage, this does not then preclude Plaintiff from offering the same
3 evidence if it is relevant to another claim that remains. The Court will not revisit its prior rulings.

4 **1. Oral Promises and the Integration Clause**

5 Defendants ask for an order excluding “Oral Promises Within the Ambit of the Integration
6 Clause.” Defendants argue “Because the Court already determined that Plaintiff’s alleged reliance
7 on oral promises allegedly made to him relating to the terms of the FMC Agreement was
8 unreasonable, evidence of and reference to such promises should be excluded at trial.” Motion at
9 1-2; Docket 160. at 10:22-11:1 (“These facts indicate that his reliance was unjustified and
10 unreasonable.”). The Court previously found that the integration clause could be a factor the jury
11 could consider in determine justifiable reliance. The Court did **not** hold, as Defendants argue, that
12 because of the Integration Clause, Plaintiff’s reliance on any unwritten promises was unjustified
13 and unreasonable.

14 To the extent the parties intended the representations at issue to
15 constitute terms of employment, the “integration clause is certainly
16 relevant to the Court’s justifiable reliance analysis and militates in
17 favor of finding that [Plaintiff] did not justifiably rely on
18 [Defendants’] alleged misrepresentations.” *Hon Hai Precision*
19 *Indus. Co.*, 2020 WL 5128629, at *13. This is particularly true here,
20 where Plaintiff is a sophisticated businessman, *see* Def. Ex. R; Pl. Decl. ¶ 4, and was represented by experienced counsel throughout
negotiations of the FMC Agreement. *See* Def. Ex. O (“Palao-
Ricketts Dep.”) at 14:22–15:7, 19:18–20:24, 57:24–58:14, 77:20–
77:25. These facts indicate that his reliance was unjustified and
unreasonable.

21 Nevertheless, a plain reading of the integration clause suggests the
22 misrepresentations on which Plaintiff allegedly relied may not fall
23 within its scope. To be sure, the integration clause is broad and
24 provides that it “supersedes all prior agreements . . . related to the
25 subject matter of this agreement.” FMC Agreement § 12 (emphasis
26 added). But the clause still only supersedes prior agreements related
27 to the “subject matter of *this* agreement,” *i.e.*, the FMC Agreement.
28 The FMC Agreement is an employment agreement, and therefore,
its subject matter relates to terms of *employment*, such as Plaintiff’s
responsibilities, compensation, and rights upon separation. In
contrast, Plaintiff’s false promise claim focuses on alleged
misrepresentations that *induced* Plaintiff to negotiate the FMC
Agreement in the first place, misrepresentations that technically do
not involve terms of employment, but such matters as the funding
and strategy of Xpanse. Such matters arguably do not relate to the

1 subject matter of the FMC Agreement (*i.e.*, the terms of the FMC
2 employment).

3 [. . .]

4 In this case, ascertaining whether the parties intended the alleged
5 representations to be within the scope of the integration clause at the
6 time the contract was executed depends on the credibility and
7 interpretations of extrinsic evidence. Thus, whether the alleged
8 misrepresentations fall within the scope of the integration clause is
9 fairly a jury question. In any event, even if every representation
10 constituted a term of employment subject to the integration clause,
an integration clause is just one factor in the determination of
justifiable reliance, and viewing the evidence in the light most
favorable to Plaintiff, a jury could still find that Plaintiff justifiably
relied on those representations. *See McCollgan*, 4 F. Supp. 3d at
1233–34 (“Justifiable reliance in a fraud action is ordinarily a
question of fact, ‘[e]xcept in the rare case where the undisputed facts
leave no room for a reasonable difference of opinion.’” (citation
omitted)).

11 Docket 160 at 10-12.

12 Accordingly, Plaintiff is not barred from introducing evidence of alleged
13 misrepresentations, and it is a question for the jury whether notwithstanding the integration clause,
14 Plaintiff’s reliance on the promises was reasonable. Defendants’ motion as to this point is
15 **DENIED**.

16

17 2. **Promises relating to the funding and strategy of Xpanse**

18 Defendants also attempt to exclude Plaintiff from arguing he relied on alleged oral
19 promises relating to the funding and strategy of Xpanse. As the Court noted in the Summary
20 Judgment Order, “Justifiable reliance in a fraud action is ordinarily a question of fact, ‘[e]xcept in
21 the rare case where the undisputed facts leave no room for a reasonable difference of opinion.’”
22 *McCollgan v. Mut. of Omaha Ins. Co.*, 4 F. Supp. 3d 1228, 1233–34 (E.D. Cal. 2014) (quoting
23 *Blankenheim v. E.F. Hutton & Co.*, 217 Cal. App. 3d 1463, 1475 (1990)). Order on Summary
24 Judgment at 10. Defendants present no case law to support the Court barring Plaintiff from
25 presenting evidence of oral promises just because emails were sent following the alleged oral
26 promises that did not include them in writing. Accordingly, the Court finds no basis to bar
27 Plaintiff from offering the relevant promises he allegedly relied upon. It is a question for the jury
28 whether Plaintiff’s reliance was reasonable, and Defendants’ motion as to this point is **DENIED**.

1

2 3. **Evidence Re Right to Equity**

3 In the Order on Summary Judgment, the Court held Plaintiff is not entitled to any equity in
4 Xpanse “because his promised Option never vested,” and dismissed Plaintiff’s Count 18. Order on
5 Summary Judgment at 16, 20. Defendants again seek an overly broad evidence exclusion of any
6 promises that were made to Plaintiff regarding his entitlement to equity because Defendants claim
7 the promises are not probative. Plaintiff confirms he “does not intend to introduce at trial, or to
8 argue, that he is in fact entitled to any equity in Xpanse or any damages relating to such equity.”
9 Opp. at 3-4. Plaintiff argues, and the Court agrees, evidence around the equity promises remains
10 probative and potentially relevant to Plaintiff’s claims regarding retaliation and firing without
11 cause. Plaintiff points to the following examples of the relevance of the promises around equity:

12 (1) “Defendants sought to value Xpanse shares differently depending on whether the
13 shareholder was a member of the Middleman family or someone else. Compl. ¶¶ 89-
14 97. Specifically, Defendants wished to value shares held by members of the
15 Middleman family by including all of Xpanse’s revenue, while valuing shares held by
16 others on only a limited portion of Xpanse’s revenue. *Id.* ¶¶ 91-92. Plaintiff, and others,
17 opposed that scheme. *Id.* ¶¶ 93-97.”

18 (2) “Plaintiff has alleged in support of his breach of contract claim that one of the reasons
19 he (and Timothy Beard) was terminated was because he pushed back against
20 Defendants’ conversion plans, rather than going along with them. *Id.* ¶¶ 132”

21 (3) “Two of the core false promises on which Plaintiff’s fraud claims are based are
22 Defendants’ promises that (1) Xpanse would be incorporated and managed
23 independently, and (2) that Xpanse would be operated in a manner that allowed it to go
24 through an Initial Public Offering. Plaintiff contends that those statements were false
25 because, among other things, Defendants changed Xpanse’s corporate form from a C
26 corporation to an LLC at the first opportunity, which eliminated its independence in
27 favor of being controlled by its members (namely, the Middleman family) and ensured
28 it could not go through an IPO. Compl. ¶¶ 115.”

1 (4) "Plaintiff contends that he was promised equity in Xpanse in such a manner that he
2 could enjoy the upside in the event it went through an IPO. Compl. ¶¶ 138, 143."
3 (5) "Plaintiff contends that he was strongly opposed to that scheme on the basis that it was
4 (1) harmful to employees who had not agreed to that provision when accepting
5 employment that provided equity, and (2) would harm Xpanse's ability to attract
6 additional talent who disliked such provisions. *Id.* ¶ 132."

7 Accordingly, Plaintiff has pointed to probative value of the alleged promises involving
8 equity (apart from his unsuccessful attempt recover as a remedy the purportedly lost equity), and
9 Defendants' motion as to this point it **DENIED**.

10
11 4. **Retaliation Evidence**

12 Defendants argue that because the Court dismissed Plaintiff's claims under the Labor Code
13 of California or Washington law, Plaintiff should be barred from offering evidence of wrongful
14 termination, retaliation, or whistleblowing. This request is beyond what the Court held. Plaintiff
15 confirms he is not pursuing damages under California or Washington law for these claims, but
16 instead that evidence about retaliation or whistleblowing is relevant because "Plaintiff contends
17 that Defendants terminated him at least in part because he refused to accede to Defendants'
18 demands with respect to an unlawful secret valuation scheme, Xpanse's change in corporate form,
19 and its harmful buy-back scheme. Compl. ¶ 132. The Court agrees this evidence may be relevant
20 to support Plaintiff's claim that was terminated reasons other than for "cause" as Defendants
21 contend. Accordingly, Defendants' motion as to this point is **DENIED**.

22
23 5. **Evidence of Relocation**

24 Defendants also ask to exclude evidence of Plaintiff's relocation. As the Court has already
25 ruled that Plaintiff moved on his own accord, this evidence is not relevant to any remaining
26 dispute, and Defendants' motion as to this point is **GRANTED**. Order on Summary Judgment at
27 27 ("Rather, the evidence establishes that the move was Plaintiff's own prerogative. In fact,
28 FMC's general counsel sent an email to Plaintiff expressing skepticism about his move to

1 Washington. In that email FMC’s general counsel deferred to Plaintiff, stating: “I obviously give
2 you very broad deference with respect to your plans for this company[,]” and that he was “[n]ot
3 looking to unduly restrict you in any way[.]” *See* Def. Ex. T.”).

4 **D. D’s MIL #4: Exclude Testimony of Ganesh Baskaran (Docket No. 226)**

5
6 Defendants move to exclude the testimony of Plaintiff’s fact witness Mr. Baskaran. Mr.
7 Baskaran is listed as a possible trial witness to testify to, among other things, “Xpanse’s
8 operations, business decisions, and employee compensation.” Mr. Baskaran started at Xpanse in
9 mid-November 2020, two months before Freedom terminated Mr. Mewawalla. Defendants argue
10 he had no involvement in Plaintiff’s pre-employment negotiations with Freedom, or his hiring, or
11 Stanley Middleman’s determination that there was “Cause” under Mr. Mewawalla’s employment
12 agreement to fire him without severance. Defendants state that any testimony from Mr. Baskaran
13 about his own employment post-dating Mr. Mewawalla’s tenure, or about his own departure from
14 Xpanse, is irrelevant to any issue in the case and should be precluded.

15 Central to Defendants’ concerns is that Mr. Baskaran had his own grievance in connection
16 with his experience/departure at Xpanse, and Defendants do not want his own grievances, lawsuit,
17 and settlement to be brought into the case, and that it should be excluded under Rule 403.

18 Plaintiff argues they do not seek to relitigate Mr. Baskaran’s grievances. Instead, Plaintiff
19 argues Mr. Baskaran’s testimony is relevant to: “Xpanse’s plans and operations; Plaintiff’s
20 competency and reputation, the nature of Xpanse’s work environment; the management styles of
21 Stanley Middleman, Gregory Middleman, Michael Middleman, Christopher Staub, and Erik
22 Anderson; and changes to Xpanse following Plaintiff’s departure. All of those topics are material
23 to the issues in dispute, and such testimony is relevant and admissible. Accordingly, Mr. Baskaran
24 should be permitted to testify about those topics.” “By way of just one example, Defendants’
25 witnesses have testified that one reason for Plaintiff’s termination was that he was spending too
26 much money on staffing without obtaining results. To the extent that Mr. Baskaran testifies that
27 Xpanse’s headcount grew even more rapidly yet still failed to deploy a product in the 12+ months
28 following Plaintiff’s termination “for cause,” that would tend to disprove Defendants’ assertion in

1 this regard.”

2 The Court narrowly **GRANTS** Defendants’ motion, under Rule 403, insofar as Defendants
3 seek to exclude any testimony on Mr. Basakran’s exit from the company, though Plaintiff argues
4 that will not be brought up. At the pretrial conference, Plaintiff further confirmed Mr. Baskaran’s
5 testimony would focus on systemic problems and issues as he saw while employed at Xpanse and
6 not grievance personal and peculiar to him. The Court warned Plaintiff that if Plaintiff or Ms.
7 Baskaran starts to stray, the Court will cut it off under Rule 403.

8 The Court **DENIES** Defendants’ remaining aspects of their motion as to the relevance of
9 Mr. Baskaran’s testimony. Plaintiff has offered possible relevance of Mr. Baskaran’s testimony,

10 **E. D's MIL #5: Exclude Evidence of Stanley Middleman's Political Views (Docket No.**
11 **227)**

12 Defendants have moved under FRE 401, 402, and 403 to exclude a videotape of a speech
13 Stanley Middleman made in 2018 and any evidence, comment, or argument about Mr.
14 Middleman’s speech or other expressions of his political or public-policy opinions. The videotape
15 is of a luncheon speech Stanley Middleman gave to a Jewish business group in 2018. In the
16 speech, Mr. Middleman mentioned that he considers California law to be “not very friendly” to
17 business and that he had discussed with his lawyers some “pitfalls” of doing business in “the
18 Republic of California.” Plaintiff argues that this request is premature as there is not enough
19 information to determine the video’s relevance, and that Defendants’ request is overbroad in
20 attempting to exclude not just the videotape but also any political opinions, or “public policy
21 opinions.” Plaintiff argues “Middleman’s ‘public policy opinions’ may well ultimately be germane
22 to the extent that he believed that the law should be changed in a manner that would have made
23 Defendants’ actions non-violative of the law. And if, for example, Mr. Middleman offered
24 testimony that directly contradicts the referenced videotape, Plaintiff certainly would be entitled to
25 introduce it.” Plaintiff’s Opp. at 5.

26 Plaintiff agrees it will not seek to introduce any such statement unless to directly impeach
27 Mr. Middleman if he testifies to the contrary. The Court **DEFERS** this motion until trial.
28

1 F. **D's MIL #6: To Exclude Evidence of Other Lawsuits Involving Defendants (Docket**
2 **No. 228)**

3 Defendants have moved to preclude “any evidence, testimony, or argument concerning
4 other lawsuits or investigations involving any of the Defendants,” stating that courts tend to
5 exclude other evidence of litigation under Rule 403, as it can create mini-trials within the main
6 trial. *See, e.g., In re Ford Motor Co. DPS6 Powershift Transmission Prods. Liab. Litig.*, 2019 WL
7 7185548, at *3 (C.D. Cal. Dec. 9, 2019) (evidence of other litigation “invites a trial-within-a trial,
8 and would likely cause confusion and waste time—concerns that run afoul of Fed. R. Evid. 403”);
9 *W. Air Charter, Inc. v. Schembari*, 2019 WL 6998769, at *5 (C.D. Cal. Jan. 11, 2019) (“The Court
10 finds that evidence of the Sojitz Lawsuit has no likelihood of proving any material facts relevant
11 to Plaintiff’s claims and would be highly prejudicial, as it could mislead the jury, confuse the legal
12 issues relevant to the dispute before them, and cause undue delay.”)

13 Plaintiff argues, and this Court agrees, that this request is premature. Plaintiff states they
14 do not presently seek to introduce such evidence at trial but should not be precluded from doing so
15 should Defendants open the door to such evidence.

16 Accordingly, the Court **DEFERS** this motion, pending trial.

17 G. **D's MIL #7: Exclude References to Or Evidence of Plaintiff's Alleged Mental Distress**
18 **and Emotional Anguish (Docket No. 229)**

19 Defendants move to exclude any of Plaintiff’s testimony regarding his mental distress and
20 emotional anguish because Plaintiff told Defendants in discovery responses he was not formally
21 diagnosed. A plaintiff is not permitted to “self-diagnose himself with—or testify as to the
22 symptoms of—depression, anxiety, [. . .]. Such testimony would stray too far into matters of
23 ‘scientific, technical, or other specialized knowledge’ prohibited by Rule 701.” *Sanchez v. Master*
24 *Prot.*, LP, 2022 WL 2092995, at *2 (C.D. Cal. May 4, 2022).

25 Plaintiff agrees to not attempt to self-diagnose with depression or anxiety, and states that
26 he is not asserting any damages resulting from any “mental and emotional injuries.” Plaintiff

1 argues, and the Court agrees, however, that Defendants' request is overly broad, as Defendants are
2 asking for an exclusion that is beyond Plaintiff attempting to improperly self-diagnose. *Sanchez v.*
3 *Master Prot., LP*, 2022 WL 2092995, at *2 (C.D. Cal. May 4, 2022) (granting motion in limine
4 "to the extent it seeks to prevent Plaintiff from medically diagnosing himself" but denying it "to
5 the extent it seeks to prevent Plaintiff from testifying that he generally felt depressed, anxious, or
6 sleep deprived"). Plaintiff states "testimony concerning, for example, his shock, surprise, and/or
7 upset resulting from Defendants' actions may also be probative of other issues, including whether
8 Plaintiff's reliance on Defendants' promises was reasonable and real; Plaintiff's actions in relation
9 to Defendants' plans to restructure Xpanse; and whether Defendants properly provided notice and
10 an opportunity to cure any issues with Plaintiff's performance" is all relevant and probative.
11 Therefore, to the extent Defendants' motion seeks to prevent Plaintiff from self-diagnosis, the
12 motion is **GRANTED**. To the extend Defendants' attempt generally to bar Plaintiff from
13 providing testimony on his feelings and emotional state, the motion is **DENIED**. *Sanchez v.*
14 *Master Prot., LP*, 2022 WL 2092995, at *2 (C.D. Cal. May 4, 2022). The Court notes that
15 Defendants' designation of Plaintiff's Interrogatory responses to Nos. 1, 2, and 5 are fair to
16 impeach Plaintiff's claims of mental and emotional health.

V. MOTION TO BIFURCATE (DOCKET NO. 214)

19 Defendants move under Fed. R. Civ. P. 42(b) for an order bifurcating the trial into two
20 phases—liability and compensatory separate from and punitive damages—to prevent Mr.
21 Mewawalla under Federal Rules of Evidence 401–403 from presenting any evidence or argument
22 about Defendants’ wealth in Phase I of the trial.

23 As this Court has previously found, the financial information of FMC is relevant to
24 damages, as well as punitive damages:

25 “In contrast, the financial status of Defendant Freedom Mortgage
26 Corporation is relevant to the claim for damages because Plaintiff
27 was allegedly promised compensation in the form of a 5% equity
28 interest in Defendant Xpanse, after Defendant Freedom Mortgage
 Corporation transferred assets to it. The only way that Plaintiff can
 assess the value is to obtain information regarding the assets of
 Defendant Freedom Mortgage Corporation. The financial

1 information is also relevant to punitive damages.”
2 Docket No. 117 at 2-3 (Order on Discovery Letters). The financial information of Xpanse is
3 similarly relevant. However, the individual wealth of Stanley Middlemen or the Middlemen
4 family is irrelevant to damages and to punitive damages and is thus excluded. “The Complaint
5 does not allege and Plaintiff does not point to any pleading in which Plaintiff claims that the
6 promises were false because Defendants lacked the resources to carry them out. Therefore, the
7 information Plaintiff seeks is not relevant to the theories of fraud.” *Id.*

8 Therefore, Defendants’ motion regarding excluding Defendants’ financial status is
9 **GRANTED** as to Middleman’s individual personal wealth but is **DENIED** as to FMC’s and
10 Xpanse’s financial status. Accordingly, the Court finds no reason to bifurcate the trial.
11 Defendants’ motion to bifurcate is **DENIED**.

12 VI. PRETRIAL STATEMENT ISSUES (DOCKET NO. 230)

13 In the Parties’ Joint Pretrial Statements, Defendants raise a number of additional issues.
14 PTC Statement at pages 8-15. Defendants also raised an issue regarding a late-noticed witness.
15 PTC Statement at page 16. The Court rules as follows:

16 A. “Xpanse-Opportunity” Damages

17 Defendants state Plaintiff’s expert includes \$32.2 million for the “Xpanse opportunity,”
18 based on Mr. Mewawalla’s assertion that, had he not been terminated, he would have remained
19 employed by Xpanse through 2026 and received large bonuses and raises. These damages were
20 connected to Count 9 that Plaintiff was terminated in violation of public policy, which this Court
21 dismissed at summary judgment. Docket No. 160 at 28-89. Plaintiff confirmed at the pretrial
22 conference he does not seek these damages anymore following the Court’s Order on Summary
23 Judgment. Thus, there appears to be no dispute, and both Parties should follow the Court’s prior
24 rulings regarding summary judgment.

1 B. **Promises Related to the Funding and Strategy of Xpanse**2 Defendants re-stated issues briefed in Defendants' MIL #3 regarding promises Plaintiff
3 claims to have relied on. The Court ruled above in Section IV.C.4
5 C. **Interpretation of Section 8(d) of the Agreement**6 The Court held at the pretrial conference that as a matter of law, Section 8(d) of the
7 Agreement regarding severance owed if a party is fired without cause is clear. The Court's
8 following construction of the section is binding on the parties:

9 If the Executive is fired without cause:

10 o 8(d)(i): The Executive is entitled to a lump sum of an entire year's worth of salary
11 plus 100% of the current year's bonus.
12 o 8(d)(ii): If the Executive had been at the company for a year, the Executive would
13 ALSO get 100% of the prior year's bonus⁸ that was earned by which had not been
14 paid already. This does not apply to Mr. Mewawalla, as he was not at FMC or
15 Xpanse for a full year.
16 o 8(d)(iii): The Executive ALSO gets COBRA benefits paid for 12 months.
17 o 8(d)(iv): The Executive ALSO gets a prorated portion of the *current* year's bonus
18 "irrespective of whether the performance goals applicable to such Discretionary
19 Bonus have been established or satisfied."20 The Court renders this interpretation because the provision on its face is not ambiguous
21 and at the hearing Plaintiff conceded he had no extrinsic evidence which would suggest the
22 provision is ambiguous. Moreover, Plaintiff's construction makes no sense; it would permit
23 double recovery under Section 8(d)(ii) and (iv). At the pretrial conference, the Court left the door
24 open for Plaintiff to prove at trial with extrinsic evidence that the agreement was modified to
25 increase the bonus to 150%.26
27

⁸ "Performance Discretionary Bonus" is defined as a bonus based on achievement of performance
28 goals, to be paid "following the anniversary of the Executive's Start Date each year ('Performance
Year')". See Employment Agreement, Section 5(c).

1
2 D. **Xpanse's Dismissal from the Case**

3 Defendants argue Xpanse should be dismissed from the case because the Court previously
4 dismissed a portion of Plaintiff's basis under Count 5 (breach of contract) and Count 18 (claim for
5 an equitable accounting of said equity) against Xpanse for equity on the ground that no options had
6 vested. But the Court did not dismiss Xpanse from the other counts in which it was named as a
7 defendant. Xpanse remains a defendant in the case.

8 As Plaintiff argues, Plaintiffs bring other claims under Counts 5 (breach of contract) and 6
9 (breach of the covenant of good faith and fair dealing) against Xpanse including: "(1) failing to
10 timely pay a portion of his signing bonus, (2) failing to provide Plaintiff with Xpanse's employee
11 benefits, (3) failing to calculate and pay him PTO, (4) terminating his employment without cause,
12 without providing notice or an opportunity to cure, and (5) failing to pay him the severance
13 benefits to which he was entitled. ECF 1 at ¶ 178." PTC Statement at 13.

14
15 E. **Interpretation of Freedom's California Employee Handbook**

16 Defendants argue that Plaintiff's calculation of his alleged PTO benefits he was owed upon
17 termination should be calculated based on a pro-rated rate determined from his base salary, non-
18 inclusive of any bonuses. Defendants point to the company's California Supplemental Employee
19 Handbook (which governs California-based employees) which states: "Upon termination of
20 employment with Freedom Mortgage, you will receive payment for any unused, accrued paid time
21 off at your base rate of pay time of termination (meaning your base hourly rate, exclusive of any
22 variable income such as commissions and/or bonuses), including a pro rata portion of your final
23 month of accrual" (emphasis in original). Defendants argue this would reduce Plaintiff's PTO by
24 \$228,475.97. Plaintiff counters that Defendants previously argued, and the Court found, that
25 Plaintiff was a resident of Washington at the time of his termination. ECF NO. 160 at 23-24
26 (noting Plaintiff's "termination occurred on January 21, 2021, when Plaintiff lived in
27 Washington). Thus, Plaintiff argues there is no factual basis to claim the California handbook's
28 calculations apply to him.

1 Defendants do not offer another basis for their interpretation at how PTO should be
 2 calculated, thus the Court holds—at this juncture—that the California Handbook’s calculation
 3 does not apply to Plaintiff since he was not a California-based employee.

4

5 F. **Exclusion of Daniel Oh**

6 At the pretrial conference, the Court allowed Defendants to take the deposition of Mr. Oh
 7 prior to trial, as he was disclosed late by Plaintiff.

8

9 **VII. OBJECTIONS TO BELLWETHER EXHIBITS**

10 A. **Recurring Issues**

11 This Order addresses the parties’ exhibit list objections regarding representative exhibits,
 12 suitable for resolution before trial (“Bellwethers”). Docket No. 230-3. Before turning to the
 13 objections, the Court first addresses two recurring issues.

14 Exhibits containing comments on Plaintiff’s performance are relevant and the state of mind
 15 of Defendants – whether they terminated Plaintiff for “Cause.” Upon request, the Court will give
 16 a limiting instruction. The Court notes, however, that the volume of such exhibits viewed
 17 cumulatively may implicate FRE 403 at some point. Defendants are thus forewarned they should
 18 proffer only their best evidence or risk exclusion under FRE403.

19 To the extent Defendants seek to admit such documents for the truth of the matter asserted
 20 therein, the Court notes they are hearsay and most contain multiple levels of hearsay, and thus
 21 even if one level meets an exception (e.g. as a business record), other hearsay problems still
 22 obtain.

23 The below admissibility determinations are rendered with these principles in mind.

24 B. **Bellwethers**

25 1. **Mewawalla Challenges to Stanley C. Middleman, et al., Exhibits**

Exhibit No.	Description	Objections	Outcome
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United States District Court
Northern District of California

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	553	567	This is an email from Jennifer Sanchez, director of human services at Archwell Solutions, containing summaries of anonymous employee survey data, sent to the Plaintiff and Gregory Middleman on October 26, 2020. Some of the survey data from the new hire check in, which was compiled in a survey deck on PowerPoint, include statements about Plaintiff (then CEO of Xpanse). The email states, “don	FRE 403, 602, and 802	FRE 403, 602, and 802	Objection overruled. Statements of survey respondents expressing their views of management are admissible to show those employees' state of mind, a fact relevant to Defendants' assessment of Plaintiff's performance and whether there was Cause to terminate him. <i>See e.g.</i> “[n]ervous that leadership does not have a lot of knowledge” (553-013), “[f]eel good about the people” (553-008), “[f]eel stuck and very frustrated” (553-008). “[f]eel like I am in a holding pattern” (553-010), “[f]eel ignored” (553-014), and “feel like I need to lead since there is not a leader present” (553-015). As to the survey itself, it reports on these employees' views and constitutes a business record under FRE 803(6). The accompanying email is likewise a business record.	Objection overruled. Admissible for the non-hearsay use to show Defendants' state of mind relative to termination.																																																																																																																																																																																																																																																																																																																						

United States District Court
Northern District of California

1	2	3	4	5	was one, but it's a lot of stuff. recruiter called greg crying that Rahul was berating her, engineers are threatening to leave, he sent stan his weekly update and it was only about his equity[.]”	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28
578	This is an email from Christopher Staub to Adam Cohen (an employee of Archwell Holdings LLC) on December 21, 2020, forwarding an email from Michael Middleman (an employee from FMC) that includes: an alleged excerpt from a blog that refers to Plaintiff as “mysterious;” discusses the motivation for certain alleged actions by Plaintiff and calls it “strange;” and then states that Plaintiff’s alleged acts were “considered strange in a Finnish company.”	FRE 403, 602, and 802	Objection sustained. FRE 403.																									
597	This is an email chain from January 21, 2021, between Christopher Staub and Gregory Middleman (an employee of Xpanse) that reports the content of an alleged conversation between two individuals about Plaintiff.	FRE 403, 602, and 802	Objection sustained. Exhibit does not go to relevant state of mind relevant to Plaintiff’s termination because Defendants had already decided to terminate Plaintiff. To the extent Defendants seek to use it to prove truth of the matters asserted (after-acquired evidence of wrongful conduct), it is hearsay on multiple levels.																									
533	This is a three-page email chain from April 30, 2020, beginning with an email from Robert D’Urbano (who reported to Michael Middleman) that provides	FRE 403, 602, and 802	Objection overruled. Admissible for the non-hearsay use to show Defendants’ state of mind relative to termination.																									

United States District Court
Northern District of California

1	his personal thoughts and negative evaluation of Plaintiff.		
2	536	This is four-page May 20, 2020, email chain that contains emails from James Luisi to Christopher Staub providing his personal thoughts and evaluation of Plaintiff. Mr. Luisi worked a Keystone, a company that Xpanse was seeking to replace.	FRE 403, 602, and 802 Objection overruled. Admissible for the non-hearsay use to show Defendants' state of mind relative to termination.
3	538	This is a July 21, 2020, instant message chain between Gregory Middleman (employed by Xpanse) and Christopher Staub in which they both criticize Plaintiff and repeat criticisms allegedly made by others ("michael, robert and others have questioned whether [Plaintiff] is good or not a lot. . . . the rest of our team is noticing it too and talking about it").	FRE 403, 602, and 802 Objection overruled. Admissible for the non-hearsay use to show Defendants' state of mind relative to termination.
4	543	This is an undated text message chain between a Ms. Sanchez (an Archwell Solutions employee) and Michael Middleman (employed by Freedom Mortgage Corporation) in which they both criticize Plaintiff (e.g. calling him "a con artist" (FM_00060482)) and repeating criticisms of him made by others that had been communicated to them.	FRE 403, 602, and 802 Objection overruled. Admissible for the non-hearsay use to show Defendants' state of mind relative to termination.
5	566	This is a November 19, 2020, email chain between Christopher Staub and Michael Middleman in	FRE 403, 602, and 802 Objection overruled. Admissible for the non-hearsay use to show Defendants' state

United States District Court
Northern District of California

1	which they quote Greggory Middleman as having “reached the end of the rope with [Plaintiff]” and criticize Plaintiff.		of mind relative to termination.
2			
3			
4	569	This is a December 3, 2020, email from Christopher Staub to Adam Cohen.	FRE 403, 602, and 802 Objection overruled. Admissible for the non-hearsay use to show Defendants’ state of mind relative to termination.
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8	572	This is a December 10, 2020, email chain between Christopher Staub, Michael Middleman, and Adam Cohen in which Michael Middleman criticizes Plaintiff’s work.	FRE 403, 602, and 802 Objection overruled. Admissible for the non-hearsay use to show Defendants’ state of mind relative to termination.
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12	573	This is a December 14, 2020, email exchange between Christopher Staub and Michael Middleman in which they each criticize business projections Plaintiff was allegedly involved in preparing.	FRE 403, 602, and 802 Objection overruled. Admissible for the non-hearsay use to show Defendants’ state of mind relative to termination.
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17	579	This is December 21, 2020, email from James Luisi to Christopher Staub, Adam Cohen, and Erik Anderson providing his personal thoughts and evaluation of certain aspects of Xpanse’s operations and employees.	FRE 403, 602, and 802 Objection overruled. Admissible for the non-hearsay use to show Defendants’ state of mind relative to termination.
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22	594	This is one of several iterations of the same email chain, which comprises emails sent on January 14-15, 2021, between Christopher Staub, Michael Middleman, Gregory Middleman, Erik Anderson (employed by Archwell Solutions), and	FRE 403, 602, and 802 Objection overruled. Admissible for the non-hearsay use to show Defendants’ state of mind relative to termination.
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1	Stanley Middleman. The email chain contains a broad range of criticisms of Plaintiff, and it relays, in many places, alleged criticisms of Plaintiff by others.		
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2. **Stanley C. Middleman, et al., Challenges to Rahul Mewawalla Exhibits**

Exhibit No.	Description	Objections	Outcome
215	This is the service draft agreement with a German real estate company, Engel & Volkers ("E&V").	FRE 403 and 802	Objection overruled. Admissible under the "verbal acts" doctrine because the EV agreement is being offered to establish that Plaintiff had another job offer, not for the truth of the matter asserted.
206	This exhibit displays a chart regarding a timeline of communication between Plaintiff and E&V.	FRE 403 and 802	Reserved. Foundation needed to determine whether this qualifies as an exception to hearsay (such as a business record). There may be multiple levels of hearsay that need to be addressed.
250	This is a chat exchange between Christopher Staub and Jordan Glick (Senior executive at Freedom Mortgage Company) regarding Plaintiff being used as a Pawn at Xpanse.	FRE 403 and 802	Objection overruled. Admissible as party-opponent statements. See FRE 801(d)(2). Statements' probative value is not substantially outweighed by unfair prejudice.
258	This is a chat exchange between Christopher Staub and Jordan Glick regarding their irritation of Plaintiff.	FRE 403 and 802	Objection overruled. Admissible as party-opponent statements. See FRE 801(d)(2). Statements' probative value is not substantially outweighed by unfair prejudice.

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VIII. OBJECTIONS TO DEPOSITION DESIGNATIONS (DOCKET NO. 230-4)

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By **Wednesday, January 15th, 2025**, Parties are to further meet and confer to resolve objections to deposition designations and file an updated JOINT statement regarding any remaining objections that the Court will resolve in advance of trial. Parties are forewarned that the time this Court takes to resolve unreasonable objections will come off the respective Parties' trial time. Parties confirmed only one witness will be called by deposition. Docket No. 261.

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IX. OBJECTIONS TO DISCOVERY RESPONSES (DOCKET NO. 230-5)

By **Wednesday, January 15th, 2025**, Parties are to further meet and confer to resolve objections to discovery responses and file an updated JOINT statement regarding any remaining objections that the Court will resolve in advance of trial. Parties should work to stipulate to authenticity. Parties are forewarned that the time this Court takes to resolve unreasonable objections will come off the respective Parties' trial time.

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X. JURY INSTRUCTIONS (DOCKET NO. 233)

By **Wednesday, January 15th, 2025**, Parties are to meet and confer and file a JOINT statement regarding stipulated, updated jury instructions, including a single updated, stipulated "Unclean Hands" jury instruction No. 30/39 as instructed by the Court, and an updated stipulated Breach of Contract instruction No. 33 and No. 34 with a cite to the section of the Employment Agreement with the definition of "Cause." **The Court notes Parties should follow the model jury instructions, give case law to support any deviation from the model, and refrain from including attorney argument within jury instructions.** The Court will file a final proposed set of jury instructions following review of Parties upcoming filing.

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1 **XI. VERDICT FORM (DOCKET NOS. 216, 231)**

2 By **Wednesday, January 15th, 2025**, Parties are to refile a JOINT updated, stipulated
3 verdict form. The Court will then file a final proposed verdict form.
4

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6 **IT IS SO ORDERED.**

7

8 Dated: January 15, 2025

9

10 
11 EDWARD M. CHEN
12 United States District Judge